Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **SUPREME COURT JUDGMENT - AXA v LORD ADVOCATE**

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The Supreme Court has today handed down its judgment in the case of AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)[1].

This case involves a legal challenge to the Damages (Asbestos-related) Conditions (Scotland) Act 2009; an Act of the Scottish Parliament. That Act provides that asymptomatic pleural plaques, pleural thickening and asbestosis constitute, and are to be treated as always having constituted, actionable harm for the purposes of an action for damages for personal injury. The effect of the Act, in Scotland, is to reverse the judgment of the House of Lords (sitting judicially) in the case of Rothwell v Chemical & Insulating Co Ltd[2] in which it held that such effects were not actionable harm and could not therefore be the subject of a claim for damages for personal injuries.

There were a number of issues considered by the Supreme Court but of particular interest for the Welsh devolution settlement was the fact that the validity of the Scottish Act was questioned on common law grounds: it was argued by the appellants (insurance companies) that Acts of the Scottish Parliament are open to judicial review as an unreasonable, irrational and or arbitrary exercise of the legislative authority conferred by the Scotland Act 1998 on the Scottish Parliament.

If that contention was held to be right, it would almost inevitably follow that Acts of the National Assembly for Wales would similarly be open to judicial review on these grounds and this is fundamental to the quality of the devolution settlement. As Lord Hope (Deputy President) states[3]:

[1] [2011] UKSC 46 - http://www.supremecourt.gov.uk/news/latest-judgments.html

[2] [2007] UKHL 39, [2008] AC 281

[3] At paragraph 42.

"…the question as to whether Acts of the Scottish Parliament and measures passed under devolved powers by the legislatures in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance."

The First Minister intervened in the appeal in the Supreme Court in order to make representations on the scope of common law challenge so far as Acts of the Assembly were concerned. I appeared before the Supreme Court to make oral representations on behalf of the Welsh Government at the hearing which took place over 13th, 14th and 15th June 2011.

Lords Hope and Reed give the leading judgments. The remainder of their Lordships (Lords Dyson, Brown, Mance, Kerr and Clarke agree with Lords Hope and Reed on the issue of common law challenge).

In his leading judgment, Lord Hope decides that "Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness"[4]. His Lordship leaves open the possibility that an Act of a devolved legislature that contravenes the rule of law (e.g. abolishing judicial review or diminishing the role of the courts in protecting the interests of individuals) might be held to be unlawful[5]. However, our position on behalf of Wales was always to agree that if this was the case, then the Acts of the Assembly would be in no different position in this respect than Acts of Parliament, so that this was not the issue upon which we sought to protect the devolution settlement.

In the second principal judgment Lord Reed decides[6] that:

"…grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes, and which are designed to prevent such bodies from exceeding their powers or using them for an improper purpose or being influenced by irrelevant considerations, generally have no purchase in such circumstances, and cannot be applied. As a general rule, and subject to the qualification which I shall mention shortly, [the Scottish Parliament's] decisions as to how to exercise its law-making powers require no justification in law other than the will of the Parliament. It is in principle accountable for the exercise of its powers, within the limits set by section 29(2), to the electorate rather than the courts."

He goes on to say[7]:

"Law-making by a democratically elected legislature is the paradigm of a political activity, and the reasonableness of the resultant decisions is inevitably a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts

[4] At paragraph 52.
[5] At paragraph 51.
[6] At paragraph 147.
[7] At paragraph 148.

and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other."

Lord Reed in addition to excluding legal challenge to Acts of the Scottish Parliament on grounds of irrationality also excludes challenges on grounds of improper purpose and the taking account of irrelevant considerations. However, like Lord Hope, Lord Reed also reserves the possibility of legal challenge on the grounds of breach of fundamental rights or the rule of law:

"Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law"[8].

In significantly limiting the grounds on which the courts might be willing to consider reviewing the Acts of the Scottish Parliament, the judgment is clearly welcome. It is of considerable significance for the Welsh devolution settlement, because, as Lord Hope said:

"…while there are some differences of detail between the Scotland Act 1998 and the corresponding legislation for Wales and Northern Ireland, these differences do not matter for present purposes. The essential nature of the legislatures that the legislation has created in each case is the same"[9].

So the Supreme Court's approach to Scottish legislation, as illustrated by the outcome of this case, will apply equally to Acts of our Assembly.

The Welsh Government will continue to analyse the implications of this case.

[8] At paragraph 153.
[9] At paragraph 43.